RECORD AND BRIEFS

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No. 16-1276

In the Supreme Court of the United States

DIGITAL REALTY TRUST, INC., PETITIONER

v.

PAUL SOMERS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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Respondent is Paul Somers, the plaintiff-appellee below.

TABLE OF CONTENTS

Page

Introduction 1

Argument 3

A. The circuit conflict is shallow and may ultimately resolve itself 3

B. This case is a suboptimal vehicle for deciding the question presented 8

C. Review is otherwise unwarranted because the decision below is correct 12

Conclusion 21

TABLE OF AUTHORITIES

Cases:

Adamov v. *U.S. Bank Nat'l Ass'n*, 726 F.3d 851 (6th Cir. 2013) 12

Arbaugh v. *Y & H Corp.*, 546 U.S. 500 (2006) 11

Asadi v. *G.E. Energy (USA), L.L.C.*, 720 F.3d 620 (5th Cir. 2013) ..... *passim*

Avocados Plus Inc. v. *Veneman*, 370 F.3d 1243 (D.C. Cir. 2004) 12

Berman v. *Neo@Ogilvy LLC*, 801 F.3d 145 (2d Cir. 2015) ..... *passim*

Bussing v. *COR Clearing, LLC*, 20 F. Supp. 3d 719 (D. Neb. 2014) 5

Deykes v. *Cooper-Standard Auto., Inc.*, No. 16-2740 (6th Cir.) (filed Dec. 15, 2016) 7

Duke v. *Prestige Cruises Int'l, Inc.*, No. 16-15426 (11th Cir.) (filed Aug. 10, 2016) 7

Duncan v. *Walker*, 533 U.S. 167 (2001) 15

FDA v. *Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000) 13, 18

Page

Cases—continued:

Fowlkes v. *Ironworkers Local 40*, 790 F.3d 378 (2d Cir. 2015) 11
Hamilton-Brown Shoe Co. v. *Wolf Bros. & Co.*, 240 U.S. 251 (1916) 8
Johnson v. *Ry. Express Agency, Inc.*, 421 U.S. 454 (1975) 8
Jones v. *SouthPeak Interactive Corp.*, 777 F3d 658 (4th Cir. 2015) 19
King v. *Burwell*, 135 S. Ct. 2480 (2015) 14
Lawson v. *FMR LLC*, 134 S. Ct. 1158 (2014) 16
Nat'l Ass'n of Home Builders v. *Defenders of Wildlife*, 551 U.S. 644 (2007) 13
Peters v. *LifeLock Inc.*, No. 14-576, 2014 WL 12544495 (D. Ariz. Sept. 19, 2014) 5
Robinson v. *Shell Oil Co.*, 519 U.S. 337 (1997) 14, 16, 20
SEC v. *Zandford*, 535 U.S. 813 (2002) 19
Sinochem Int'l Co. v. *Malaysia Int'l Shipping Corp.*, 549 U.S. 422 (2007) 12
Steel Co. v. *Citizens for a Better Env't*, 523 U.S. 83 (1998) 12
TRW Inc. v. *Andrews*, 534 U.S. 19 (2001) 16
Utility Air Regulatory Group v. *EPA*, 134 S. Ct. 2427 (2014) 15, 18
Verfuerth v. *Orion Energy Sys., Inc.*, No. 16-3502 (7th Cir.) (filed Sept. 22, 2016) 7
Virginia Military Inst. v. *United States*, 508 U.S. 946 (1993) 8

Statutes, regulation, and rule:

Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (Dodd-Frank), Pub. L. No. 111-203, 124 Stat. 1376 ..... *passim*
15 U.S.C. 78u-6 ..... 1, 10, 19, 20
15 U.S.C. 78u-6(a)(6) ..... *passim*

Page

Statutes, regulation, and rule—continued:

15 U.S.C. 78u-6(h) ..... *passim*
15 U.S.C. 78u-6(h)(1)(A)(iii) ..... *passim*
15 U.S.C. 78u-6(j) 13
Sarbanes-Oxley Act of 2002,
Pub. L. No. 107-204, 116 Stat. 746 2
18 U.S.C. 1514A ..... *passim*
18 U.S.C. 1514A(a) 11
18 U.S.C. 1514A(a)(1)(C) 15
18 U.S.C. 1514A(b) 11, 20
18 U.S.C. 1514A(b)(1) 9, 11
18 U.S.C. 1514A(b)(1)(A) 9
18 U.S.C. 1514A(b)(1)(B) 9
18 U.S.C. 1514A(c)(1) 11, 19
28 U.S.C. 1292(b) 9
17 C.F.R. 240.21F-2(b)(1)(ii) 13
Sup. Ct. R. 10 5

Miscellaneous:

Associated Press, *Republican-led House Panel Votes To Gut Dodd-Frank Financial Law*, L.A. Times, May 4, 2017 <tinyurl.com/amendingdoddfrank> 5
Ed Beeson, *Three Little Words: Confusion Over Dodd-Frank Is Leaving Whistleblowers Exposed*, Law360, Sept. 19, 2016 <tinyurl.com/doddfrankconfusion> 6
Recent Legislation, *Congress Expands Incentives for Whistleblowers to Report Suspected Violations to the SEC*, 124 Harv. L. Rev. 1829 (2011) 17
Samuel C. Leifer, Note, *Protecting Whistleblower Protections in the Dodd-Frank Act*, 113 Mich. L. Rev. 121 (2014) 16
Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* (2012) 14

Page

Miscellaneous—continued:

Securities and Exchange Commission, *Interpretation of the SEC's Whistleblower Rules Under Section 21F of the Securities Exchange Act of 1934*, 80 Fed. Reg. 47829 (Aug. 10, 2015) 17
Securities and Exchange Commission, *Proposed Rules for Implementing the Whistleblower Provisions of Section 21F of the Securities Exchange Act of 1934*, 75 Fed. Reg. 70488 (Nov. 17, 2010) 17
Stephanie Johnson, U.S. Chamber of Commerce, *Comment Letter* (Dec. 17, 2010) <tinyurl.com/uschambercomments> 17
Stephen M. Shapiro et al., *Supreme Court Practice* (10th ed. 2013) 9

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INTRODUCTION

According to petitioner, this case presents a "straightforward conflict" on an "important and recurring question involving the interpretation of the Dodd-Frank Act." Pet. 9.[1] In the main, petitioner is correct. The issue is admittedly important and recurring, and the courts of appeals are indeed divided over this issue. Compare *Asadi* v. *G.E. Energy (USA), L.L.C.*, 720 F.3d 620 (5th Cir. 2013), with *Berman* v. *Neo@Ogilvy LLC*, 801 F.3d 145 (2d Cir. 2015) (rejecting *Asadi*), and Pet. App. 1a-11a (agreeing with *Berman*).

[1] See Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (Dodd-Frank), Pub. L. No. 111-203, 124 Stat. 1376, codified in relevant part at 15 U.S.C. 78u-6.

But for multiple reasons, petitioner is still wrong that this case warrants further review. First, the circuit conflict is shallow and may ultimately resolve itself. The Fifth Circuit was not only the first circuit to resolve the issue, but the *only* circuit to do so without the benefit of the SEC's direct participation. There is accordingly *no* split (2-0) in the courts of appeals where the panel had the benefit of hearing directly from the expert agency tasked with administering this particular statute.

The Fifth Circuit's reasoning has since been roundly criticized by a majority of lower courts, and the SEC has carefully articulated a host of reasons that the Fifth Circuit erred. Other circuits will soon have an opportunity to consider the issue; if they continue following the majority view, there is every reason to believe the Fifth Circuit will reconsider the question at the appropriate time.

Moreover, the benefit of additional percolation easily outweighs the small cost of delay. There is no dispute that petitioner's alleged conduct violates federal law; the only question is whether it violates *two* separate statutes instead of one. The decision below accordingly will not disturb any legitimate business practices or settled expectations. Public companies, under the view of all sides to the case, are forbidden from retaliating against parties for reporting violations via internal schemes. Any company that avoids violating Sarbanes-Oxley[2] will also avoid violating Dodd-Frank. That is hardly a situation calling out for immediate review.

This case also represents an imperfect vehicle for resolving the question presented. It arises in an interlocutory posture, and it can arise again, if necessary, upon final judgment. More importantly, the case also faces an

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[2] See Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 746; 18 U.S.C. 1514A.

unresolved jurisdictional problem. In the proceedings below, petitioner maintained that respondent's failure to exhaust administrative remedies under Sarbanes-Oxley—the Act under which he was *not* suing—deprived the court of jurisdiction to resolve his actual claim under Dodd-Frank. While respondent believes petitioner's argument is baseless, the lower courts failed to address it. If the issue is truly jurisdictional, the Court would be obligated to resolve it before reaching the question presented. That impediment alone is a sufficient basis for denying review.

Finally, further review is unwarranted because the decision below is correct. Petitioner jumps immediately into construing the statute without acknowledging the SEC's paramount authority in this area. Congress expressly charged the SEC to administer this provision, and (as the split above shows) the statute is at a minimum ambiguous. Since no one genuinely disputes that the SEC's regulation is unreasonable, it should control under settled principles of administrative deference. And the SEC's construction is not only reasonable but correct: petitioner's view would render entirely insignificant a critical anti-retaliation safeguard, and do so in a way that would upset the proper operation of both Dodd-Frank and Sarbanes-Oxley.

The SEC has carefully balanced the competing interests in this area, and resolved the question presented in a manner that is consistent with the statute and advances Congress's intent. Its authoritative construction controls, and petitioner's contrary position is mistaken. The petition should be denied.

ARGUMENT

A. The Circuit Conflict Is Shallow And May Ultimately Resolve Itself

According to petitioner, there is a "substantial" circuit conflict, and the case is ripe for immediate review. Pet. 16.

But this "substantial" conflict is limited to a 2-1 split among three circuits; the only circuit to side with petitioner (the Fifth) went first, before the other two circuits emphatically rejected its position—including by calling out considerations the Fifth Circuit simply overlooked. Moreover, the SEC did not participate in the Fifth Circuit (but did in the other circuits), so there is no split at all in cases directly involving the agency tasked with enforcing the statute. There accordingly is good reason to believe the Fifth Circuit will reconsider its position, especially if additional circuits continue lining up against it.

Nor is there any real urgency in resolving this question. Petitioner says that the decision below will have "pernicious consequences" for public companies. Pet. 17. Yet it is undisputed that petitioner's alleged conduct violates federal law; the only question is whether relief is available under *two* statutes, rather than one. The same substantive conduct is prohibited either way, and petitioner's behavior should be the same no matter how this case is resolved. Indeed, it will face *no* consequences, pernicious or otherwise, so long as it stops illegally retaliating against internal whistleblowers. It surely can tolerate a short period of additional percolation to provide a reasonable opportunity for the Fifth Circuit to revisit the issue, or for the political branches to weigh in (if they deem it necessary). Further review at this time is unwarranted.

1. According to petitioner, this case presents a "clear and intractable" circuit conflict. Pet. 3. But while the existing conflict is admittedly clear, it is hardly intractable. The Fifth Circuit went first in deciding this issue, and it failed to consider material points undermining its position. It further acted without the benefit of the SEC's direct participation, which might have avoided the Fifth Circuit's error. The Second and Ninth Circuits, with the SEC's expert input, did not merely disagree with the

Fifth Circuit; they examined additional factors that the Fifth Circuit did not, and they explicitly refuted key aspects of the Fifth Circuit's analysis.[3] It thus is entirely possible that the Fifth Circuit will eventually reconsider its position.[4]

2. Contrary to petitioner's contention (Pet. 19-20), additional percolation is warranted. As described above, the Fifth Circuit may resolve the split by reconsidering its flawed opinion. But even if the Fifth Circuit refuses to act, the political branches may dispose of the confusion on their own.

First, Congress is actively considering a multitude of amendments to Dodd-Frank. See, *e.g.*, Associated Press, *Republican-led House Panel Votes To Gut Dodd-Frank Financial Law*, L.A. Times, May 4, 2017 <tinyurl.com/amendingdoddfrank>. If it feels that the SEC misunderstood the statutory scheme, it can always say so directly by amending Section 78u-6(h)(1)(A) and addressing the precise issue dividing the lower courts. But cf., *e.g.*,

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[3] More specifically, these courts have attacked *Asadi*'s textual analysis (*e.g.*, *Berman*, 801 F.3d at 153-154; Pet. App. 7a), its view of the statutory purpose and operation (*e.g.*, Pet. App. 9a-10a), and its understanding of the legislative history (*e.g.*, *Berman*, 801 F.3d at 154-155). See also, *e.g.*, *Peters* v. *LifeLock Inc.*, No. 14-576, 2014 WL 12544495, at *4, *5 (D. Ariz. Sept. 19, 2014) ("may courts have criticized [*Asadi*] as adopting an overly restrictive view of the statutory language"; "[t]his construction is not convincing for multiple reasons not addressed by the Fifth Circuit"); *Bussing* v. *COR Clearing, LLC*, 20 F. Supp. 3d 719, 732-733 (D. Neb. 2014) (rejecting *Asadi* as "unwieldy").

[4] Petitioner is correct that dozens of district courts have adopted conflicting decisions. Pet. 12, 15-16. But those conflicts do not independently warrant review (see Sup. Ct. R. 10), as the supervising circuits are capable of resolving any confusion at the district level. Those conflicts will also predictably dissipate once additional circuits adopt the majority position.

Ed Beeson, *Three Little Words: Confusion Over Dodd-Frank Is Leaving Whistleblowers Exposed*, Law360, Sept. 19, 2016 <tinyurl.com/doddfrankconfusion> ("We need to make sure people report wrongdoing, however they choose to report it. * * * The whistleblowers who are in the thick of things know the best place to go with their information, whether it's internal or external, and they need to feel safe doing it. It would hurt the cause of fraud reporting to discourage an entire category of whistleblowers. * * * *In this case, the SEC has it right in its interpretation that the law protects internal and external whistleblower reporting.*") (statement of Sen. Grassley) (emphasis added).

Second, the SEC always has the option of revisiting the issue. If Dodd-Frank's protection for internal reporting truly creates as many problems as petitioner suggests, then the SEC could take appropriate measures to promulgate a modified regulation. While respondent respectfully suggests such a course is exceedingly unlikely—for any number of obvious reasons—a short delay in taking up the issue would give the agency time to evaluate its options.[5]

3. Petitioner is correct that this is a "recurring" question that "arises often" in the lower courts. Pet. 9, 17. But in these circumstances, recurrence is a reason for *denying* review, not granting it: There will be ready opportunities

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[5] Of course, the SEC's ability to curtail protection for internal reporting under Section 78u-6(h) would depend on convincing courts that the statute does not unambiguously *require* such protection. Although certain courts have upheld the regulation on the ground that the statute is ambiguous (*e.g.*, *Berman*, *supra*), others have suggested that the SEC's reading is the *only* permissible reading (cf. Pet. App. 10a). For those courts, the SEC would lack the ability to narrow Congress's protections for this important category of internal whistleblowing.

to decide the question in the event the conflict persists after additional circuits confront the question. Indeed, the question is currently pending in at least three additional circuits. See, *e.g.*, *Deykes* v. *Cooper-Standard Auto., Inc.*, No. 16-2740 (6th Cir.) (filed Dec. 15, 2016); *Verfuerth* v. *Orion Energy Sys., Inc.*, No. 16-3502 (7th Cir.) (filed Sept. 22, 2016); *Duke* v. *Prestige Cruises Int'l, Inc.*, No. 16-15426 (11th Cir.) (filed Aug. 10, 2016). A short delay will provide appropriate room for the Fifth Circuit to reconsider its position or other circuits to further develop the relevant arguments.

Nor is there any significant cost to a modest delay. Petitioner argues that the decision below imposes "pernicious" consequences on employers. But that proposition is highly doubtful. The question presented asks whether conduct actionable under Sarbanes-Oxley is *separately* actionable under Dodd-Frank. That means that petitioner's conduct (as alleged) is already unlawful under federal law. The only daylight between the circuits is whether such illegal retaliation violates *two* federal statutes instead of one.

This is thus unlike situations where companies are subjected to different *substantive* standards in different jurisdictions. Every public company here faces the same nationwide rule prohibiting retaliatory acts under Sarbanes-Oxley; every employer (including petitioner) should conform their conduct to that governing federal standard irrespective of the outcome of this case. The fact that some wrongfully terminated parties may ultimately seek relief under Section 78u-6(h) (instead of Section

1514A) is not the kind of grave concern that warrants immediate review.[6]

B. This Case Is A Suboptimal Vehicle For Deciding The Question Presented

According to petitioner, this case is an "optimal" vehicle for resolving this issue. Pet. 10. But this case suffers from at least two vehicle concerns, each of which is an appropriate basis for denying review.

1. The case arises in an interlocutory posture, a sufficient reason alone for denying the petition. *Hamilton-Brown Shoe Co.* v. *Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916) (the lack of final judgment "alone furnishe[s] sufficient ground" for denying certiorari); see also, *e.g.*, *Virginia Military Inst.* v. *United States*, 508 U.S. 946, 946 (1993) (Scalia, J., respecting the denial of certiorari) ("[w]e generally await final judgment in the lower courts before exercising our certiorari jurisdiction"). "[E]xcept in extraordinary cases, [a] writ [of certiorari] is not issued until final decree," *Hamilton-Brown Shoe*, 240 U.S. at 258, and there is nothing remotely "extraordinary" here. This case reaches the Court from a motion to dismiss. There are multiple other claims pending below (Pet. App.

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[6] According to petitioner, the decision below threatens to "upset th[e] balance" between Sarbanes-Oxley and Dodd-Frank, "essentially rendering obsolete the Sarbanes-Oxley Act's anti-retaliation scheme." Pet. 17-18 (citing Dodd-Frank's "distinct advantages"). This is incorrect. Each scheme presents its own set of benefits and costs; parties have different reasons for preferring each scheme, which is presumably why Congress gave injured claimants a choice between available remedies. Cf. *Johnson* v. *Ry. Express Agency, Inc.*, 421 U.S. 454, 461 (1975). Indeed, even under petitioner's theory, there is a hypothetical subset of plaintiffs—those who use both internal and external reporting—that indisputably could invoke either set of remedies. No one seriously believes that this choice threatens the "balance" between these integrated regulatory schemes. See also Part C.3.a, *infra*.

12a-13a), and further proceedings could develop a fuller record better suited for the Court's review—or even obviate the need for any review entirely.

To be sure, this case was certified for immediate appeal under 28 U.S.C. 1292(b), and it does present a pure and important question of law. "But nothing in the Interlocutory Appeals Act itself or in its legislative history suggests that the Court should depart from its usual rules respecting review of interlocutory judgments." Stephen M. Shapiro et al., *Supreme Court Practice* § 4.19, at 286 (10th ed. 2013). If petitioner later wishes to present the same question, it can do so again, if necessary, after final judgment. But that slight inconvenience for this single petitioner on this single claim does not warrant abandoning the Court's traditional and sound practice of refusing to hear interlocutory appeals in all but the most unusual and compelling circumstances. See, *e.g.*, *id.* § 4.18, at 282-285.

And that practice holds especially true here, where additional proceedings will present a fully developed record and allow additional time for the issue to percolate among the lower courts. If respondent in fact prevails on the merits, and if at that point other courts still reach opposite conclusions after squarely addressing the question presented in a meaningful way, review in this Court might indeed be appropriate. It is not, however, appropriate for this case at this time.

2. This case also arises with a potential, but unaddressed, jurisdictional problem. According to petitioner's briefing below (C.A. Br. 35-38; C.A. Reply Br. 33-37), if Dodd-Frank protects internal disclosures under Sarbanes-Oxley, it must also require *exhaustion* under Sarbanes-Oxley. See 18 U.S.C. 1514A(b)(1)(A)-(B) (authorizing enforcement actions by "filing a complaint with the Secretary of Labor" or "if the Secretary has not issued

a final decision within 180 days of the filing of the complaint * * * , bringing an action at law or equity * * * in the appropriate district court"). Petitioner argued that Section 1514A's procedures are automatically grafted onto claims under Section 78u-6(h), and further argued that those procedures are jurisdictional in nature. See, *e.g.*, C.A. Br. 35-36 & n.6 ("determining if administrative exhaustion is required under Dodd-Frank as it is under Sarbanes-Oxley * * * is a jurisdictional consideration"). Thus, according to petitioner, respondent's failure to exhaust his Dodd-Frank claim under Sarbanes-Oxley's administrative scheme eliminated subject-matter jurisdiction over that claim. *Ibid.*[7]

To be perfectly clear, while petitioner did raise this issue below, the argument is wholly insubstantial. First and foremost, it plainly misunderstands the statutory scheme. Administrative exhaustion under Sarbanes-Oxley is mandated *for those seeking relief under Sarbanes-Oxley*. It is a predicate for invoking the particular right of action granted by that Act. It has nothing to do, however, with the underlying *conduct* required or protected under that Act. Compare 15 U.S.C. 78u-6(h)(1)(A)(iii) (protecting "disclosures that are required or protected" under Sarbanes-Oxley—yet *not* requiring proceedings under Sarbanes-Oxley's enforcement scheme).[8]

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[7] It is undisputed that respondent did not exhaust his remedies under Section 1514A—*because he was not proceeding under that section*. His claims may have invoked Sarbanes-Oxley as a predicate for relief, but his private right of action was authorized directly under Section 78u-6(h)(1)(A)(iii). See Pet. App. 13a.

[8] This is immediately clear from Section 1514A's text and structure: It first outlines "[w]histleblower protection" under subsection (a)—describing conduct that is protected under the Act—and then *separately* authorizes "[e]nforcement action[s]" under subsection (b) if

When Section 78u-6(h)(1)(A)(iii) specifically covered internal disclosures "protected or required" by Sarbanes-Oxley, it said absolutely nothing about incorporating that Act's separate administrative or remedial scheme. Petitioner may prefer exhaustion under both Acts, but Congress limited exhaustion to proceedings under Section 1514A. It is not required under Section 78u-6(h), and hence it poses no obstacle to respondent's Dodd-Frank claims.

Second, even if Section 1514A's administrative scheme somehow applied here, it is plainly wrong that any failure to exhaust has jurisdictional implications. Not every statutory element or requirement is automatically jurisdictional (*Arbaugh* v. *Y & H Corp.*, 546 U.S. 500, 515-516 (2006)), and nothing in Section 1514A suggests failing to exhaust implicates a court's subject-matter jurisdiction. Section 78u-6(h) itself assuredly says nothing to that effect, and neither provision uses any of the classic formulations typical of jurisdictional provisions. Just as the courts of appeals have found related schemes to be non-jurisdictional, there is absolutely no basis for thinking that Section 1514A's particular exhaustion requirement (found in a different statute, no less) carries jurisdictional consequences under Section 78u-6(h). See, *e.g.*, *Fowlkes* v. *Ironworkers Local 40*, 790 F.3d 378, 384-385 (2d Cir. 2015) ("a plaintiff's failure to exhaust administrative remedies available for Title VII [retaliation] claims does not pose a

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those protections are violated. 18 U.S.C. 1514A(a), (b); see also 18 U.S.C. 1514A(c)(1) (providing the "[r]emedies" for "action[s] under subsection (b)(1)"). The former delineates the protected conduct and prohibitions, and the latter authorizes actions to enforce those prohibitions. See also 18 U.S.C. 1514A(b)(1) ("[a] person who alleges discharge or other discrimination by any person in violation of subsection (a) may seek relief under subsection (c)"). Dodd-Frank is concerned only with the former, not the latter.

jurisdictional bar"); *Adamov* v. *U.S. Bank Nat'l Ass'n*, 726 F.3d 851, 855-856 (6th Cir. 2013) ("Because Congress has not explicitly restricted the court's jurisdiction in cases where a plaintiff has not exhausted administrative remedies, a district court may not dismiss the [retaliation] claim on jurisdictional grounds."); *Avocados Plus Inc.* v. *Veneman*, 370 F.3d 1243, 1248 (D.C. Cir. 2004) ("[w]e presume exhaustion is non-jurisdictional unless 'Congress states in clear, unequivocal terms that the judiciary is barred from hearing an action until the administrative agency has come to a decision'").

But the wrongness of petitioner's lower-court position is not what matters here. The mere presence of this issue is adequate reason to pause before granting review. The district court declared the issue waived (Pet. App. 43a-44a), and the court of appeals failed to address it at all (Pet. App. 1a-11a). But if the issue were truly jurisdictional, it could not be waived—and this Court would be forced to resolve it at the outset, before reaching the merits of the question presented. See, *e.g.*, *Sinochem Int'l Co.* v. *Malaysia Int'l Shipping Corp.*, 549 U.S. 422, 430-431 (2007); *Steel Co.* v. *Citizens for a Better Env't*, 523 U.S. 83, 93-94 (1998). That poses a clear obstacle to review, and casts considerable doubt on this case as an appropriate vehicle for resolving the question presented.

C. Review Is Otherwise Unwarranted Because The Decision Below Is Correct

Review is also unwarranted because the decision below is correct. Petitioner's cramped interpretation is directly at odds with Section 78u-6's text, purpose, structure, and history, which is precisely why the SEC (as the agency tasked with its enforcement) has rejected it after formal notice-and-comment rulemaking. Even without delving into detail more appropriate for plenary review, the majority position is plainly correct.

1. Petitioner frames the issue as a basic question of statutory construction (Pet. 3), but that is wrong. This is not simply a matter of construing a statute, but reviewing an *agency's* construction of that statute. Congress expressly charged the SEC with enforcing these provisions, 15 U.S.C. 78u-6(j), and the SEC invoked that authority in construing the statute to protect internal whistleblowing, 17 C.F.R. 240.21F-2(b)(1)(ii). In order to set aside the agency's interpretation, petitioner must not merely establish that its preferred construction is reasonable, but that it is *mandatory*. Unless Congress spoke to the "precise question" at issue, the agency's position is entitled to deference. *FDA* v. *Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132 (2000); see also *Nat'l Ass'n of Home Builders* v. *Defenders of Wildlife*, 551 U.S. 644, 666 (2007).[9]

Petitioner, however, barely acknowledges the SEC's vital role in this process. It did not, for example, recognize or reproduce the language of Section 78u-6(j): "The Commission shall have the authority to issue such rules and regulations as may be necessary or appropriate to implement the provisions of this section consistent with the purposes of this section." And petitioner did not grapple with how this textual delegation confirms Congress's view of the SEC's importance in construing these interlocking schemes.

In order for petitioner to prevail, it must demonstrate that Congress unambiguously foreclosed the SEC's inter-

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[9] Nor is this task a simple matter of reading the definitional section on its own: "In determining whether Congress has specifically addressed the question at issue, a reviewing court should not confine itself to examining a particular statutory provision in isolation. The meaning—or ambiguity—of certain words or phrases may only become evident when placed in context." *Brown & Williamson*, 529 U.S. at 132.

pretation of the statute it was explicitly charged with administering. As the majority of courts have determined, petitioner cannot overcome that heavy burden.

2. In its question presented, petitioner asks whether Section 78u-6(h)'s anti-retaliation provision extends to individuals who "fall outside the Act's definition of a 'whistleblower.'" Pet. I (referencing 15 U.S.C. 78u-6(a)(6)). But the real question is not whether respondent fits within that statutory definition, but whether Congress intended that general definition *to apply specifically to subsection (h)*. See, *e.g.*, *Berman*, 801 F.3d at 147 ("the issue presented is whether the 'whistleblower' definition in [Section 78u-6(a)(6)] applies to subdivision (iii) of [Section 78u-6(h)(1)(A)]," which "does not within its own terms limit its protection to those who report wrongdoing to the SEC"). And there are compelling indications that Congress did not intend the "whistleblower" definition to restrict subdivision (iii)'s broad sweep.

First, contrary to *Asadi*'s wooden reasoning (720 F.3d at 623, 627), statutory definitions are not always controlling. As *Berman* explained, while "the terms of a definitional subsection are usually to be taken literally," "'[d]efinitions are, after all, just one indication of meaning—a very strong indication, to be sure, but nonetheless one that can be contradicted by other indications.'" 801 F.3d at 154 (quoting Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 227-228 (2012)). Thus, "[t]he use of a term in one part of a statute 'may mean [a] different thing[]" in a different part, depending on context." Pet. App. 7a (quoting *King* v. *Burwell*, 135 S. Ct. 2480, 2489 (2015)); see also *Robinson* v. *Shell Oil Co.*, 519 U.S. 337, 341 (1997).

And the context here is plain. Subdivision (iii) textually cross-references provisions in Sarbanes-Oxley that do *not* require reporting to the SEC *and* define the protected

class *as "[w]histleblower[s]."* 18 U.S.C. 1514A(a)(1)(C). This is further contrasted by the textual references to the SEC-disclosure requirements in subdivisions (i) and (ii), which would arguably "be superfluous" under petitioner's construction. *Berman*, 801 F.3d at 154. In short, subsection (a)'s "definition speaks of reporting to the Commission, but subdivision (iii) incorporates Sarbanes-Oxley provisions, which contemplate internal reporting, without reporting to the Commission." *Ibid.* At a minimum, this leaves "significant tension" between these two critical provisions. See, *e.g.*, *Utility Air Regulatory Group* v. *EPA*, 134 S. Ct. 2427, 2441 (2014) ("the presumption of consistent usage 'readily yields' to context, and a statutory term—even one defined in the statute—'may take on distinct characters from association with distinct statutory objects calling for different implementation strategies'").

Second, petitioner's interpretation "would, in effect, all but read subdivision (iii) out of the statute." Pet. App. 8a. This Court has repeatedly rejected statutory readings that would render terms "insignificant, if not wholly superfluous." *Duncan* v. *Walker*, 533 U.S. 167, 174 (2001). Yet petitioner's reading would "narrow[]" subdivision (iii) "to the point of absurdity." Pet. App. 8a. It would entirely cut out protections for lawyers and auditors—two key groups with essential roles in catching and stopping unlawful conduct. *Berman*, 801 F.3d at 151 ("[T]here are categories of whistleblowers who cannot report wrongdoing to the Commission until after they have reported the wrongdoing to their employer. Chief among these are auditors and attorneys."). If an employee must report internally before having the option of reporting to the SEC, the employee is left without any meaningful protection at all—"that required preliminary step would result in early

retaliation before the information could reach the regulators." Pet. App. 7a; see also *id.* at 8a ("Sarbanes-Oxley and the Exchange Act prohibit potential whistleblowers—auditors and lawyers—from reporting to the SEC until after they have reported internally. The anti-retaliation provision would do nothing to protect these employees from immediate retaliation in response to their initial internal report.") (citation omitted).

Given the critical roles occupied by lawyers and auditors under both Dodd-Frank and Sarbanes-Oxley, it is implausible that Congress intended to strip away their protections in such an indirect fashion. See, *e.g.*, *Lawson* v. *FMR LLC*, 134 S. Ct. 1158, 1162, 1168 (2014). And even aside from those professionals, "although there may be some potential whistleblowers who will report wrongdoing simultaneously to their employer and the Commission, they are likely to be few in number." *Berman*, 801 F.3d at 151. Indeed, while *Asadi* imagined this hypothetical group to give subdivision (iii) some effect, 720 F.3d at 627-628, it failed to identify a single, real-world example fitting this unusual pattern.[10] "Thus, apart from the rare example of simultaneous (or nearly simultaneous) reporting of wrongdoing to an employer and to the Commission, there would be virtually no situation where an SEC reporting requirement would leave subdivision (iii) with any scope." *Berman*, 801 F.3d at 152 (footnote omitted); see also, *e.g.*, *TRW Inc.* v. *Andrews*, 534 U.S. 19, 29 (2001) (asking whether a construction "would in practical effect render [an] exception entirely superfluous in all but the most unusual circumstances"); *Robinson*, 519 U.S. at 346.

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[10] See Samuel C. Leifer, Note, *Protecting Whistleblower Protections in the Dodd-Frank Act*, 113 Mich. L. Rev. 121, 139 (2014) ("The Fifth Circuit is also unable to point to any concrete examples of such a situation ever occurring.").

Third, petitioner's reading, unlike respondent's, makes little sense in light of the overall statutory scheme. Sarbanes-Oxley's chief focus is on internal compliance and internal reporting. *E.g.*, Recent Legislation, *Congress Expands Incentives for Whistleblowers to Report Suspected Violations to the SEC*, 124 Harv. L. Rev. 1829, 1832 (2011). Yet a rule hinging protection exclusively on *external* reporting directly frustrates that statutory objective. It discourages the use of internal policing, and defeats the point of setting up "internal processes for investigating and responding to potential violations of the Federal securities laws." Securities and Exchange Commission, *Proposed Rules for Implementing the Whistleblower Provisions of Section 21F of the Securities Exchange Act of 1934*, 75 Fed. Reg. 70488, 70488 (Nov. 17, 2010). "Providing equivalent employment retaliation protection for both situations removes a potentially serious disincentive to internal reporting by employees in appropriate circumstances." Securities and Exchange Commission, *Interpretation of the SEC's Whistleblower Rules Under Section 21F of the Securities Exchange Act of 1934*, 80 Fed. Reg. 47829, 47830 (Aug. 10, 2015). Petitioner's competing interpretation, by contrast, "would undermine the other incentives that were put in place through the Commission's whistleblower rules in order to encourage internal reporting." *Ibid.*[11]

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[11] The U.S. Chamber of Commerce participated in the rulemaking process, submitting a comment (together with other groups) underscoring "the important role that internal corporate programs have in promoting compliance with securities and other laws," and arguing that "preserving that role should be a policy touchstone in formulating rules to implement the Dodd-Frank whistleblower provisions." Stephanie Johnson, U.S. Chamber of Commerce, *Comment Letter* 3 (Dec. 17, 2010) <tinyurl.com/uschambercomments>. Although the

The SEC properly recognized that Congress did not intend to create "a 'two-tiered structure of anti-retaliation protections that might discourage some individuals from first reporting internally in appropriate circumstances.'" Pet. App. 42a. By directly frustrating the key aims of Sarbanes-Oxley, petitioner's theory would create an utterly incoherent statutory scheme. See, *e.g.*, *Utility Air*, 134 S. Ct. at 2442 (asking whether a construction is "incompatible * * * with th[e] programs' regulatory structure"); *Brown & Williamson*, 529 U.S. at 133 ("words of a statute must be read in their context and with a view to their place in the overall statutory scheme") (internal quotation marks omitted).

Finally, the legislative history supports the decision below. While the congressional record is limited, this provision was added at the last minute by the Conference Committee in reconciling the House and Senate versions of Dodd-Frank. *Berman*, 801 F.3d at 152-153 & n.8. It takes little imagination to understand what happened: "When conferees are hastily trying to reconcile House and Senate bills, each of which number hundreds of pages, and someone succeeds in inserting a new provision like subdivision (iii) into subsection 21F(h)(1)(A), it is not at all surprising that no one noticed that the new subdivision and the definition of 'whistleblower' do not fit together neatly." *Id.* at 154. It is "doubtful that the conferees who accepted the last-minute insertion of subdivision (iii) would have expected it to have the extremely limited scope it would have if it were restricted by the Commission reporting requirement in [subsection (a)]." *Id.* at 155;

Chamber advocated for conditioning *award* eligibility based on internal reporting, the same principles apply equally to whistleblower protections. It is unclear how the Chamber squares its current position as amicus with its comments to the SEC.

see also *SEC* v. *Zandford*, 535 U.S. 813, 819 (2002) ("we have explained that the statute should be 'construed "not technically and restrictively, but flexibly to effectuate its remedial purposes"'").

3. a. In response, both petitioner and the Fifth Circuit maintain that the decision below would render Sarbanes-Oxley's enforcement scheme "moot" because "no one would use it." Pet. App. 9a (describing *Asadi*, 720 F.3d at 628-629); Pet. 18 (arguing that the Act's scheme will become "obsolete" because Dodd-Frank "affords whistleblowers several distinct advantages that the Sarbanes-Oxley Act does not"). But this theory has been squarely refuted by the SEC, as "Sarbanes-Oxley may be more attractive to the whistleblowing employee in at least two important ways." Pet. App. 9a (describing the SEC's arguments).

First, while petitioner presumes that most parties wish to avoid administrative review, that is certainly not true for all parties. Under Sarbanes-Oxley, the agency "tak[es] responsibility for asserting the claim on the whistleblower's behalf," thus reducing "cost[s]" and "stress[]" for parties otherwise pursuing relief on their own in federal court. *Ibid.* Just as employers often prefer administrative review, employees may likewise prefer it for similar reasons.

Second, while Dodd-Frank does authorize double backpay, see 15 U.S.C. 78u-6(h)(1)(C), Sarbanes-Oxley authorizes "all relief necessary to make the employee whole," including "compensation for any special damages," 18 U.S.C. 1514A(c)(1), (2)(C). See Pet. App. 9a-10a (citing *Jones* v. *SouthPeak Interactive Corp.*, 777 F3d 658, 672 (4th Cir. 2015)). Although some employees will favor double backpay, "[a]n employee who has suffered more substantial emotional injury than financial harm would

likely be better off with Sarbanes-Oxley's allowance for special damages." Pet. App. 9a-10a.

Petitioner has no response to these straightforward observations.

b. According to *Asadi*, removing the SEC reporting requirement from subdivision (iii) would "violate the surplusage canon" by "read[ing] the words 'to the Commission' out of the definition of 'whistleblower' for purposes of the whistleblower-protection provision." 720 F.3d at 628. This is wrong. That "definition" would still retain force in the broadest sweep of the statute, including the key provisions limiting the universe of individuals eligible for incentive awards. See, *e.g.*, 15 U.S.C. 78u-6(b)(1). But as *Berman* explained, the question is not what the definitional section means, but rather whether it applies at all to subdivision (iii). 801 F.3d at 147; see also *Robinson*, 519 U.S. at 343 ("those examples at most demonstrate that the term 'employees' may have a plain meaning in the context of a particular section—not that the term has the same meaning in all other sections and in all other contexts"). In light of the statute's plain text, structure, and purpose, the answer is plainly no.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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